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In the Supreme Court
OF THE
United States

OCTOBER TERM 1952

No. 652

WATERMAN STEAMSHIP CORPORATION, a corporation,
Petitioner,

vs.

SHIPOWNERS & MERCHANTS TOWBOAT CO., LTD., a corporation, and Tug SEA FOX, INC., a corporation, on their own behalf and on behalf of the master, officers and crew of the Tug SEA FOX,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit
AND
BRIEF IN SUPPORT THEREOF.

CLARENCE G. MORSE,
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FRANCIS L. TETREAULT,
310 Sansome Street, San Francisco 4, California,
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WATERMAN STEAMSHIP CORPORATION, a corporation,
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vs.

SHIPOWNERS & MERCHANTS TOWBOAT CO., LTD., a corporation, and Tug SEA FOX, INC., a corporation, on their own behalf and on behalf of the master, officers and crew of the Tug SEA FOX,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner, Waterman Steamship Corporation, hereinafter referred to as "petitioner" or "Waterman", respectfully presents to this Honorable Court its petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review a final decision made and entered by that Court on October 30, 1952 (R. 433), a rehearing thereof having been denied on December 22, 1952 (R. 479), Pope, Circuit Judge, dissenting (R. 480).

The judgment of the Court of Appeals is reported in 199 F. 2d 600. The opinion on denial of rehearing is not yet reported.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

Respondent Shipowners contracted to provide the Tug SEA FOX and to use its best efforts to tow the SS HERALD OF THE MORNING, a "dead" ship,[1] from San Francisco Bay to Everett, Washington. The SEA FOX and HERALD departed from San Francisco Bay on November 5, 1948, and on the second day, in moderate weather, the towing wire broke, and the SEA FOX being unable to put its spare towing wire aboard, another tug was sent out from

[1] A "dead" ship is one whose power plant is shut down.

San Francisco Bay which towed the HERALD to nearby Drake's Bay. In attempting to handle her spare towing wire, the SEA FOX broke the fitting of her towing engine which is used in reeling in the towing wire and also jettisoned her spare full length towing wire. At Drake's Bay on November 8, 1948 the towing wire was transferred to the SEA FOX from the other tug, but the defect in the SEA FOX'S towing engine was not repaired and the SEA FOX was not furnished with a spare full length towing wire. THE SEA FOX and HERALD departed Drake's Bay and several days later, after the SEA FOX received storm warnings on November 12 and 13, ran into a severe storm on November 15. The HERALD again broke adrift on November 16, and salvage services were rendered to the HERALD by various government and private vessels.

A more detailed statement of the facts is set forth in Appendix "A" attached hereto. For convenience of the Court, we set forth the Beaufort Scale in Appendix "B" and in Appendix "C" the scripts of the weather broadcasts to mariners during the period in question.

The master of the tug SEA FOX, R. T. Sommer, held no license enabling him to serve as master of the tug SEA FOX on the high seas and lacked the high seas experience that would be necessary to secure such a license. In so serving as master and in himself standing a watch, Mr. Sommer (and respondents) acted in violation of the International Conven-

tion concerning the Minimum Requirement of Professional Capacity for Masters and Officers, 54 Stat. at L. Pt. 2, p. 1683 (effective in the United States October 29, 1939); administrative and penalty provisions, 46 U.S.C. Sec. 224a, et seq. (see Appendices "D" and "E").

A libel *in personam* to recover salvage services rendered to the HERALD after she broke adrift the second time was filed by Shipowners on behalf of the tug SEA FOX and its crew, and a companion libel *in personam* for salvage was filed by Puget Sound Tug & Barge Co. on behalf of the tugs NEPTUNE and HERCULES and the crews of said tugs. The trial Court found no negligence on the part of respondents, held that the HERALD broke adrift "solely by reason of the violence of the storm", and held that the lack of a license on the part of Mr. Sommer "did not and could not have contributed to the plight of the HERALD" (R. 55-69). The award to the owner and crews of the tugs HERCULES and NEPTUNE totaling $22,250 was paid promptly and in full. Being gravely aggrieved by the judgment granting $24,750 to Shipowners as salvage in addition to $5,750 paid under the towage contract and denying Waterman recovery for its heavy expense and damage in favor of Shipowners, Waterman appealed to the Court of Appeals for the Ninth Circuit and has now taken this petition to this Honorable Court.

JURISDICTION.

A libel *in personam* in admiralty alleging the essential of the foregoing facts was timely filed by respondents against Waterman in the District Court of the United States for the Northern District of California, Southern Division, seeking to obtain an award for salvage services. Waterman appeared therein generally.

Jurisdiction of that admiralty matter existed in the District Court of the United States under the provisions of 28 U.S.C.A. Sec. 1333 (1). A final decree was made and filed in the trial Court on June 20, 1951, and entered June 21, 1951 (R. 70). A petition for appeal and order allowing appeal were filed September 17, 1951 and a notice of appeal to the Court of Appeals for the Ninth Circuit was filed September 17, 1951 (R. 73, 75).

Appellate jurisdiction of the Court of Appeals for the Ninth Circuit existed under 28 U.S.C. Sections 1291 and 2107.

The jurisdiction of the Supreme Court of the United States rests upon 28 U.S.C. Section 1254 (1). The final decision of the Court of Appeals for the Ninth Circuit was made and entered on October 30, 1952 (R. 437), and the order denying a rehearing was made and entered on December 22, 1952 (R. 479).

This petition will be filed within the ninety (90) day period allowed by 28 U.S.C. Section 2101. A stay of the mandate of the Court of Appeals has been obtained.

QUESTIONS PRESENTED.

The questions presented in this petition are:

1. May a tug owner recover salvage from the owner of a dead tow (without proving that its failure to provide the tug with a licensed master and licensed watch officer as required by statute could not have contributed to the exposure of the tow to the peril which required the rendition of "salvage" services) where on the clear and undisputed evidence produced by the tug owner it appears that:

a. The tug had undertaken and performed a high seas towing operation with a "master" who held no license and lacked the high seas experience necessary to secure a license (in violation of 46 U.S.C.A. 224(a)), and

b. The tug had performed a high seas towing operation with one watch (8 hours per day) commanded by an "officer" who held no high seas license and lacked the high seas experience necessary to secure a license (in violation of 46 U.S.C.A. 224(a)), and

c. The tug under the direction of the unlicensed "master" had left a place of safety with her tow without repairing the broken "fairlead traveler" of her towing engine—a device provided to enable the tow to reel in the towing cable and

d. The tug under the direction of the unlicensed "master" had left a place of safety with no spare towing cable of adequate length (one

towing cable having previously parted in moderate weather) and

e. The tug under direction of the unlicensed "master" had for 36 hours effectively ignored the radio warnings it had received of the approach of the storm which ultimately placed the tow in the peril requiring the "salvage" services, and

f. The tug owner had contracted to "use its best efforts" to tow the dead ship safely to destination?

2. If the answer to question 1 is negative, i.e., that a tug owner may not collect "salvage" from its tow without proving that its own statutory fault not only did not but could not have contributed to the peril giving rise to the salvage, then does the tug owner carry the burden of proof placed on it where the record shows by the undisputed testimony of the tug owner's own witnesses that

a. The "master" of the tug lacked the four years' high seas experience and other high seas qualifications necessary under 46 C.F.R. 10.15-29 and 10.15-31 to secure a license or certificate, and

b. That one watch (8 hours per day) had been commanded by an "officer" without the high seas experience and other qualifications necessary under 46 C.F.R. 10.15-29 and 10.15-31 to secure a license or certificate, and

c. The tug under the direction of the unlicensed "master" had left a place of safety with

her tow without repairing the broken "fairlead traveler" of her towing engine, a device provided to enable the tow to reel in the towing cable, and

d. The tug under the direction of the unlicensed "master" had left a place of safety with no spare towing cable of adequate length (one towing cable having previously parted in moderate weather), and

e. The tug under direction of the unlicensed "master" had for 36 hours effectively ignored the radio warnings it had received of the approach of the storm which ultimately placed the tow in the peril requiring the "salvage" services, and

f. The tug owner had contracted to "use its best efforts" to tow the dead ship safely to destination, and

g. That the month of November, when the tow was performed, is recognized as a stormy season off the North Pacific Coast when gales are to be expected?

3. In an admiralty case what weight, if any, may a Court of Appeals accord the "finding of fact" of the trial Court where it clearly appears from the record

a. That the trial Court has accepted without change the "findings" proposed by prevailing counsel, and

b. That the critical "findings of fact" are "conclusions of law" phrased as "findings of fact" by prevailing counsel for "appeal proofing" and so adopted unchanged by the trial Court, and

c. That the "findings of fact" as proposed by prevailing counsel and adopted unchanged by the trial Court are (1) in conflict with the trial Court's memorandum opinion, (2) contrary to the record, and (3) for purposes of "appeal proofing" omit necessary findings of fact required by the Court's opinion and the record?

4. In an admiralty case may the Court of Appeals affirm on the basis of "appeal proofing" findings of fact not supported by the record a case decided by the trial Court as a question of law without passing on the question of law?

5. May a tow recover from its tug the damage and expense incurred by the tow by reason of exposure to peril where the tow proves that the "master" of the tug in violation of statute held no license and lacked the high seas experience to secure a license and that in violation of statute an unlicensed person (without the high seas experience necessary to secure a license) commanded a watch, in the absence of proof by the tug owner that its statutory fault not only did not but could not have contributed to the tow's peril? (The tug has asserted other collateral defenses to this phase of the case and if this question

is answered in the affirmative the case may properly be remanded to the Court of Appeals for the Ninth Circuit for further proceedings, although the record before this Court is complete for determination of all questions.)

REASONS RELIED UPON FOR ISSUANCE OF WRIT.

A writ of certiorari should issue for the following reasons:

(1) The Court of Appeals for the Ninth Circuit has effectively held that the rule of the *Pennsylvania* case (1874), 86 U.S. 125, does not apply where a tug guilty of statutory fault is claiming salvage from her tow, and thereby has decided an important federal question which has not been but should be decided by this Honorable Court.

(2) The Circuit Court has decided an important question of federal law in conflict with decisions applying the rule of the *Pennsylvania* case for various statutory violations in the Supreme Court of the United States.

> *The Martello,* 153 U.S. 64, 38 L. Ed. 637 (Collision in dense fog):
>
> "There can be no doubt that the Willey was guilty of a statutory fault in the failure to provide herself with the fog horn prescribed by the international regulations, and the presumption is that this fault contributed to the collision. *This is a presumption which attends every fault connected with the management of the vessel,*

> *and every omission to comply with a statutory requirement,* or with any regulation deemed essential to good seamanship." (Italics supplied.)

(3) The decision in this case is in direct conflict with the opinion of the Court of Appeals for the Ninth Circuit in the case of *Carr v. Hermosa Amusemeni Corp.,* 137 F. 2d 983.

(4) The decision in this case is in conflict with decisions in other circuits in which failure to comply with statutory requirements respecting manning has been held to constitute statutory fault.

The Henry O. Barrett (C.C.A. 3, 1908), 161 Fed. 481:

> A collision occurred between the towed Henry O. Barrett and the anchored dredge Columbia. The towing tug was held at fault under the *Pennsylvania* rule because an unlicensed man was in charge of the mate's watch.

The City of Baltimore (C.C.A. 4, 1922), 282 Fed. 490:

> A collision case. One vessel was at fault because she was being navigated by a person without a master's license.

Martin Marine Transportation Co. v. U. S. (C.C.A. 4, 1950), 183 F. 2d 676:

> Collision involving barges not carrying a full complement in crews, in violation of certain statutes.

(5) The Court of Appeals failed to apply the *Pennsylvania* rule, and without review, consideration

or question accepted the trial Court's statement that if the *Pennsylvania* rule be deemed to apply the burden of proof thereunder had been met by respondents. This was error. Not only did the tug master fail to have a proper license, he failed to have the qualifications necessary to obtain such license, and, even more important, his conduct of the tow and his determinations on various matters requiring exercise of discretion affirmatively established lack of judgment and experience to be expected of a properly licensed master.

As stated by Pope, Circuit Judge (R. 480), the finding that the burden of proof rule of the Pennsylvania has been met "* * * is manifest error," and "* * * it is simply impossible to conclude that the master's lack of qualifications 'could not have contributed' to the loss." In so erring the Court of Appeals has so departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

(6) In accepting without comment or question the District Court's "findings of fact" as prepared by prevailing counsel despite their conflict with the record and opinion and critical omissions for "appeal-proofing" purposes, the Court of Appeals has so failed in its functions of review in an admiralty case as to require an exercise of this Court's power of supervision.

(7) In affirming on the basis of fictional "findings of fact" devised as "appeal-proofing" by prevailing

counsel a case patently decided by the District Court as a question of law without passing on that question of law the Court of Appeals has so departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

(8) The granting by the Court of Appeals for the Ninth Circuit of full weight to unfair "findings of fact" prepared by prevailing counsel as "appeal-proofing" gives rise to a conflict with the Second Circuit in which such "findings" are accorded little or no weight (*City of New York v. McLain Lines,* (C.A. 2, 1945), 147 F. 2d 393), with the Fourth Circuit where such "findings" receive less weight and dignity (*The Severance* (C.A. 4, 1945), 152 F. 2d 916), and with the Seventh Circuit which holds such "findings" entitled to no weight (*Process Engineers v. Container Corporation* (C.A. 7, 1934), 70 F. 2d 487; Cert. den. 293 U.S. 588).

(9) In holding that the trial Court's "findings of fact" relating to lack of negligence, possible causation and extent of the tug's contractual obligation, were presumptively correct and not subject to review in the absence of clear error, the decision of the Court of Appeals for the Ninth Circuit in this case is in conflict with the Court of Appeals for the Second Circuit (*Sternberg Dredging Co. v. Moran* (C.A. 2, 1952), 196 F. 2d 1002, 200 F. 2d 603; *A&P v. Brasilero* (C.A. 2, 1947), 159 F. 2d 661; Cert. den. 331 U.S. 836; *Blumenthal v. Atlantic Coast Line Ry. Co.*

(C.A. 2, 1943), 139 F. 2d 288; Cert. den. 321 U.S. 795), and the Court of Appeals for the Fourth Circuit (*Bonnewell v. U. S.* (C.A. 4, 1948), 170 F. 2d 411). The present admiralty case was of course tried by the judge without a jury and the "findings" in dispute related to matters as to which there was no conflict in evidence. The Second and Fourth Circuits hold that in such circumstances "findings" as to negligence, standard of care and causation are in actuality "conclusions of law" entitled to no weight because misnamed "findings of fact" by the trial Court and requiring full review by the Appellate Court.

Wherefore petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit to review the decision of that Court in this case, and submits, attached hereto, its brief in support of this petition.

Dated, San Francisco, California,
March 9, 1953.

Respectfully submitted,
CLARENCE G. MORSE,
Proctor for Petitioner.

GRAHAM & MORSE,
FRANCIS L. TETREAULT,
Of Counsel.

CERTIFICATE OF COUNSEL.

State of California,
City and County of San Francisco.—ss.

Clarence G. Morse, being first duly sworn, upon his oath deposes and says:

That he is one of the attorneys for petitioner in the above entitled cause; that he has read and considered the foregoing petition and the attached supporting brief and is familiar with the contents of said petition and brief; that in affiant's judgment the said petition is well founded in point of law as well as in fact, and the same is not interposed for delay.

CLARENCE G. MORSE.

Subscribed and sworn to before me this 9th day of March, 1953.

(Seal) HELEN E. WALSH,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires October 22, 1954.

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WATERMAN STEAMSHIP CORPORATION, a corporation,
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SHIPOWNERS & MERCHANTS TOWBOAT CO., LTD., a corporation, and Tug SEA FOX, INC., a corporation, on their own behalf and on behalf of the master, officers and crew of the Tug SEA FOX,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

JURISDICTION.

The jurisdiction of the Supreme Court of the United States rests upon 28 U.S.C. Sec. 1254(1). The final decision of the Court of Appeals for the Ninth

Circuit was made and entered on Oct. 30, 1952 (R. 437) and the order denying a rehearing was made and entered on Dec. 22, 1952 (R. 479). This petition will be filed within the ninety-day period allowed by 28 U.S.C. Sec. 2101. The jurisdiction of this admiralty matter existed in the United States District Court under the provisions of 28 U.S. Code Sec. 1333(1). Appeal jurisdiction of the Court of Appeals for the Ninth Circuit existed under 28 U.S.C. Secs. 1291 and 2107.

OPINIONS OF THE COURTS.

The memorandum opinion of the trial Court (R. 38) is reported in 98 Fed. Supp. 123. The final decree was made June 20, 1951 and entered June 21, 1951 (R. 70-72). The per curiam opinion of the Court of Appeals for the Ninth Circuit was made and filed Oct. 30, 1952 (R. 434-436) and is reported in 199 F. (2d) 600. The judgment of the Court of Appeals for the Ninth Circuit was filed Oct. 30, 1952 (R. 437). The petitioner timely filed its petition for rehearing (R. 439) and the Court of Appeals for the Ninth Circuit denied said petition on December 22, 1952 (R. 479) with Pope, Circuit Judge, filing a dissenting opinion (R. 480-481).

STATEMENT OF FACTS.

Respondent Shipowners contracted to provide the tug SEA FOX or the tug SEA PRINCE and to

use its "best efforts" to tow the SS HERALD OF THE MORNING, a "dead" ship from San Francisco Bay to Everett, Wash. (R. 290). The SEA FOX and HERALD departed from San Francisco Bay on November 5, 1948, and on the second day in moderate weather (R. 108) the towing wire broke and the SEA FOX being unable to put a spare towing wire aboard (R. 233), another tug was sent out from San Francisco Bay, which towed the HERALD to the nearby Drakes Bay (R. 233). In attempting to handle her spare towing wire, the SEA FOX broke the fitting of her towing engine which is used in reeling in the towing wire (R. 58), and also jettisoned her spare, full-length towing wire (R. 109-110). At Drakes Bay on November 8, 1948, the towing wire was transferred to the SEA FOX from the other tug (R. 233-234) but the defect in the SEA FOX's towing engine was not repaired and the SEA FOX was not furnished with a spare, full-length towing wire (R. 109). The SEA FOX and HERALD departed Drakes Bay and several days later, after the SEA FOX on Nov. 12 and 13 received storm warnings by radio (R. 194) ran into a severe storm on Nov. 15 (R. 163-164). The HERALD again broke adrift on Nov. 16 (R. 124) and salvage services were rendered to the HERALD by various government and private vessels.

A more detailed chronological statement of the facts is set forth in Appendix "A" attached hereto.

The master of the tug SEA FOX, R. T. Sommer, held no license enabling him to serve as master of

the tug SEA FOX on the high seas (R. 245) and lacked the high seas experience that would be necessary to secure such a license. In so serving as master and in himself standing a watch (R. 298), Mr. Sommer (and respondents) acted in violation of the International Convention Concerning the Minimum Requirement of Professional Capacity for Masters and Officers, 54 Stat. at L., Pt. 2, P. 1683 (effective in the United States October 29, 1939), set forth *in extenso* in Appendix "D"; Administrative and Penalty Provisions, 46 U.S.C. 224(a), et seq., set forth *in extenso* in Appendix "E".

A libel *in personam* to recover a salvage reward for services rendered to the HERALD after she broke adrift the second time was filed by Shipowners on behalf of the tug SEA FOX and its crew, and a companion libel *in personam* for salvage was filed by Puget Sound Tug and Barge Co. on behalf of the tugs NEPTUNE and HERCULES and the crews of said tugs. The trial Court concluded "that the lack of an unlimited master's license on the part of Captain Sommer did not and could not have contributed to the plight of the HERALD; that the HERALD went adrift and into a position of grave danger solely by reason of the violence of the storm; * * * that the HERALD went adrift in said gale without fault or negligence on the part of anyone." (R. 66). The award of $22,250 to the owner and crews of the tugs NEPTUNE and HERCULES was paid promptly and in full. Being gravely aggrieved by the award of $24,750 to Shipowners as salvage in addition to

$5,750 previously paid under the towage contract and the denial of recovery from Shipowners for Waterman's heavy damages and expenses, Waterman appealed to the Court of Appeals for the Ninth Circuit and has now taken this petition to this Honorable Court.

SPECIFICATION OF ERRORS.

The Court of Appeals made four fundamental errors. The errors were cumulative. The first three errors inevitably gave rise to the fourth error which resulted in a holding in conflict with every decision on similar issues made by other Circuit Courts and this Court for the past 75 years. The Court of Appeals erred in:

(1) Giving full weight to unfair "findings of fact" prepared by prevailing counsel as "appeal-proofing" despite their conflict with the record and opinion and critical omissions for "appeal-proofing" purposes.

(2) Giving weight to and considering as "findings of fact" the trial Court's conclusions (a) that the HERALD went adrift solely by reason of the violence of the storm, (b) that the SEA FOX incurred risks and performed services beyond the scope of her towage contract, (c) that the danger to the tow was not occasioned or contributed to by any negligence of the tug, and (d) that the statutory fault of Shipowners in failing to provide a licensed and qualified master could not have contributed to the peril since the HERALD went adrift solely by reason of the

violence of the storm,—despite the fact that the evidence affecting the issues in question was without conflict and despite the fact that the trial Court in its opinion had clearly stated its holding on (b) as a conclusion of law and its holdings on (a) and (d) as dictum.

(3) Failing to hold that the statutory fault of Shipowners in failing to provide a licensed and qualified master placed upon Shipowners the burden under the *Pennsylvania* (1874) 86 U.S. 125 of proving that its fault not only did not but could not have contributed to the danger of the HERALD and in failing to hold that Shipowners had failed to sustain its burden of proof thereunder.

(4) Holding that a tow must pay full salvage to its tug and may not recover damages from the tug where on the tug's uncontested evidence it appears: that in violation of statute the tug had no licensed master and had one watch commanded by an unlicensed unqualified officer; that the tug left a place of safety with its tow with the fairlead traveller, a part of its towing engine necessary for heaving in the towing hawser, broken and of no use; that the tug for more than 36 hours wholly ignored radio warnings of the approach of the gale which eventually broke the tow adrift; that the tug had left a place of safety with no spare towing hawser of adequate length; and that all of the foregoing occurred in the North Pacific in the month of November which is recognized and known as a place and season where violent storms are to be expected.

ARGUMENT.

FIRST AND SECOND SPECIFICATIONS OF ERROR.

THE COURT OF APPEALS ERRED IN GIVING WEIGHT TO SO-CALLED "FINDINGS OF FACT" WHICH WERE (1) MERE APPEAL-PROOFING OR (2) CONCLUSIONS OF LAW.

This case should present one question and one question only. That question is whether the rule of the *Pennsylvania* case (1874) 86 U.S. 125 applies to a tug and dead tow situation and places upon the tug the burden of proving that its admitted statutory fault in going to sea with an unlicensed and unqualified master not only did not but could not have contributed to the placing of the tow in a situation of peril requiring the rendition of "salvage" services. There is no question about the statutory fault. Likewise, on the record, if the *Pennsylvania* rule applies there is and can be no question that the tug (respondent Shipowners) has not and cannot carry its burden of proof.

We do not believe that any reasonable man reading the record could say that Shipowners had carried a burden of proving that the lack of a licensed and qualified master *did not* contribute to the tow's peril.

We state unequivocally that no reasonable man can read the record and say that Shipowners has carried a burden of proving that the lack of a licensed and qualified master on the tug *could not* have contributed to or caused the tow's peril. As Judge Pope said in his dissenting opinion on the petition for rehearing (R. 481):

> "* * * it is simply impossible to conclude that the master's lack of qualifications 'could not have

contributed' to the loss or the situation which gave rise to the necessity of salvage."

The ultimate question presented by this petition is important and clear-cut. Petitioner, however, was deprived of a consideration of that important question by "appeal-proofing" findings of fact and by conclusions of law phrased as findings of fact which misled the Court of Appeals into considering the question presented by the appeal to be a question of fact (R. 435).

The first two specifications of error which we here discuss are directed solely to those errors of the Court of Appeals in permitting itself to be misled by the beguiling but specious "findings of fact" presented to it by the trial Court for review.

Every "finding of fact" upon which the Court of Appeals relied was either "appeal-proofing", drafted by prevailing counsel and adopted without change by the trial Court despite omissions, conflicts with the record and the opinion, or was a "conclusion of law" rephrased as a "finding of fact" by prevailing counsel for the purpose of "appeal-proofing".

A. Contested "findings of fact" were conclusions of law and should have been reviewed de novo.

Although one could never discover such from the "findings of fact", the case was decided by the trial Court as a question of law—the same question as to which we in vain attempted to secure a review in the Court of Appeals and which we are now present-

ing. We quote from the comments of the trial Court at the hearing on "settlement of findings" (R. 471):

> "To be frank with you, the only thing that bothered me in the case at any time—I say this kindly—was that the Pennsylvania doctrine has no application here. I at last determined that it did not, and the Circuit Court may take a different view; I don't know."

At the trial the only issues as to which there was any conflict in the testimony related to the violence of the weather and the extent of the peril of the tow. There was no conflict as to the events which took place aboard the tug since all such testimony necessarily came from the crew of the tug. The "findings" which we assert the Court of Appeals erroneously treated as factual rather than as conclusions of law all concern issues as to which there was no conflict in the evidence. We refer to the "findings" appearing on page 66 of the record. These may be summarized as follows:

(a) The failure to provide the tug with a licensed master did not and could not have contributed to the plight of the HERALD.

(b) The HERALD went adrift and into a position of danger solely by reason of the violence of the storm.

(c) The HERALD went adrift in the gale without fault or negligence upon the part of anyone.

(d) After the towing hawser parted the tug SEA FOX performed services to save the HERALD which were not within the scope of the tug's original contract.

Each of the foregoing "findings" should have been given full review by the Court of Appeals as a *conclusion* of the trial judge on undisputed evidence. It is clear that in the Second Circuit and the Fourth Circuit such "findings" would have been accorded no weight but would have been given full review as the "conclusions of law" they are.

The strikingly similar factual situation of a tow damaged by its tug encountering heavy weather was before the Court in *Blumenthal v. Atlantic Coast Line Ry. Co.* (2 C.A. 1943), 139 F. (2d) 288, cert. den. 321 U.S. 795 and we quote:

> "Upon this appeal it insists that there are no disputed questions of fact, and that, as the decision below was not 'clearly erroneous' we have nothing to review. That depends upon whether we are to call the proper standard of care a question of fact. In cases tried to a jury it is indeed treated as such, although obviously it is not a question of fact, for it measures the duty and liability which the law imposes; upon appeal in a case tried to a judge we think it should not be so regarded. As we view it therefore, the cause comes before us as it did before the district judge; like him we have only to decide what measure of care the situation imposed * * *
>
> "The carrier answers that the hurricane was an act of God—to which we agree, but to which we answer that an act of God is no excuse if negligence be shown."

Likewise in the Second Circuit and to the same effect confirming the view that "findings of fact"

relating to negligence, lack of negligence and causation are in actuality "conclusions of law" requiring review as such are *A&P v. Brasilero* (2 C.A. 1947), 159 F. (2d) 661, cert. den. 321 U.S. 795, and *Sternberg Dredging Co. v. Moran Towing and Transp. Co.* (2 C.A. 1952), 196 F. (2d) 1002, rehearing denied, 200 F. (2d) 603.

In the Fourth Circuit it likewise is the rule that questions of negligence based on undisputed facts are as freely reviewable in the Appellate Court as are conclusions of law. *Bonnewell v. U. S.* (4 C.A. 1948), 170 F. (2d) 411.

B. The so-called "finding of fact" that the statutory failure of the tug to provide a licensed and qualified master could not have contributed to the tow's danger since the HERALD went adrift solely by reason of the violence of the storm (R. p. 66) is patently a conclusion of law and an erroneous one.

> In Edward the First's time some of the cases remind us of the barbarian laws at their rudest stage * * * If a man fell from a tree, the tree was deodand. If he drowned in a well, the well was to be filled up. *The Common Law,* p. 24, O. W. Holmes.

The trial Court gratuitously and as dictum threw into its memorandum opinion a comment to the effect that the HERALD had been set adrift solely by the violence of the storm (R. p. 51). The tug interests seized upon this gratuitous and horseback conclusion, converted it into a "finding of fact" and relied upon it as the primary bulwark in their magnificent "appeal-proofing" edifice, which in the absence of review

by this Court will continue to stand as a monument to the proposition that no litigant need fret lest the law be against him if only his counsel can have a free hand in drafting the conclusions of law as "findings of fact".

The "finding of fact" in question is patently a conclusion of law and a conclusion based on a spectacularly primitive view of the law which was repudiated more than three centuries ago. Long before 1773 when the famous *Squib* case (*Scott v. Shepherd,* 2 Wm. Bl. 892) was decided the law was settled that legal causation is not limited to that event which is closest in time.

Questions of causation, and *a fortiori,* questions of possible causation such as are presented by this so-called "finding" are questions of law, which again, because of Shipowners' "appeal-proofing", was understandably but mistakenly viewed by the Court of Appeals as a question of fact and for that reason not reviewed.

The proper rule was well stated by Lord Shaw of Dunfermline for the House of Lords in *Leyland Shipping Co., Ltd. v. Norwich Union Fire Ins. Soc.* (1918), A.C. 350:

> "To treat proximate cause as the cause which is nearest in time is out of the question. Causation is not a chain; it is a net. At each point influences, forces, events precedent and simultaneous meet; and the radiation from each point extends infinitely."

Here there is no reason for confusing law with fact as sometimes necessarily occurs when a case is tried to a jury. Here the case was tried to the Court and the disputed "finding" is based on uncontested evidence. The conclusion is necessarily a conclusion of law, and a erroneous one.

As the Second Circuit in *Blumenthal v. Atlantic Coast Line Ry. Co.* (2 C.A. 1943), 139 F. (2d) 288, cert. den. 321 U.S. 795 said in reversing the trial Court despite "findings" that the loss had occurred through an act of God and that there was no negligence:

> "The carrier answers that the hurricane was an act of God—to which we agree, but to which we answer that an act of God is no excuse if negligence be shown."

We frankly admit that the towline probably would not have parted if the HERALD and the SEA FOX had been lying quietly in a landlocked harbor on a calm day.

On the other hand in the present state of the law of causation we find incredible the trial Court's conclusion that the lack of a licensed master "could not" have contributed to the loss in the face of the uncontested testimony of the tug-owner's own witnesses that radio storm warnings were effectively ignored for 36 hours, that he set out from a place of safety without repairing the broken fairlead traveller of his towing engine (necessary to heave in the towing hawser), without a spare towing cable of practicably

usable length, where it does not appear from the record that the master had the high seas experience necessary to secure a certificate under the statute or even that he understood the interpretation and use of weather bulletins, as would have been required of him if he were to obtain a certificate as required under the statute.

C. The contested "findings of fact" are patent "appeal-proofing" in conflict with the opinion and record and replete with omissions of facts required by the opinion and the record to be stated. As such they are entitled to no weight and in the Second and Fourth Circuits would have been discounted.

We do not claim that the District Court intentionally miscast its findings in order to deny petitioner its right to a fair review. We do assert unequivocally and with no reservation that by permitting the tug owner to draft "findings" as it pleased the District Court invited the error which was made by the Court of Appeals and in the absence of review by this Court permitted petitioner to be deprived of its appeal by astute legal draftsmanship.

This problem regrettably is not a novel one, but in other circuits it is settled that "findings of fact" so prepared by prevailing counsel and accepted by the trial Court without modification (cf. R. pp. 465-477) despite critical omissions and conflicts with the opinion and the record are entitled to little or no weight.

"Findings" so prepared do not facilitate the work of the Appellate Court but rather add to it, and in some instances such as the present case so add

to the burden of the Appellate Court as to wholly prevent it from performing its duty of reviewing important questions of law. It has not thus far to our knowledge, however, been held that the losing party in the trial Court must suffer by reason of such fictional "findings of fact". If such a holding were ever made it would be a frank admission that the right of appeal is meaningful only where the findings in the trial Court are made by a diligent and conscientious Court and/or successful counsel is incompetent.

"Findings of fact" of this non-realistic type prepared by prevailing counsel have received attention and properly scathing comment in the Seventh Circuit where they are entitled to no weight (*Process Engineers v. Container Corporation* (C.A. 7, 1934), 70 F. (2d) 487, cert. den. 293 U.S. 588, and also in the Fourth Circuit which holds such findings are entitled to little or no weight (*The Severance* (C.A. 4, 1945), 152 F. (2d) 916). The Second Circuit has reached the same result in *City of New York v. McLain Lines* (C.A. 2, 1945), 147 F. (2d) 393.

The Supreme Court in *U. S. v. Crescent Amusement Co.*, 323 U.S. 173, 89 L. Ed. 160, cited with approval, but did not expressly pass on the point, the opinion of the Second Circuit in *U. S. v. Forness* (C.A. 2, 1942), 125 F. (2d) 928 at 942, in which Judge Frank commented with vehemence upon a similarly distasteful incident, saying:

> "In the instant case, a comparison of the findings with the opinion seems to show that the findings

proposed by the defendants were mechanically adopted, with the consequence that some of the findings made by the District Court are not supported by the evidence and not substantially in accord with the opinion * * * We stress this matter because of the grave importance of fact finding. The correct finding, as near as may be, of the facts of a law suit is fully as important as the application of the correct legal rules to the facts as found. An impeccably 'right' legal rule applied to the 'wrong' facts yields a decision which is as faulty as one which results from the application of the 'wrong' legal rule to the 'right' facts. * * *"

D. Comparative listing of critical conflicts between so-called "findings" and the record and opinion.

We list herewith a few critical examples comparing the "findings" as prepared by prevailing counsel and adopted without change by the trial Court with the equivalent portions of the opinion and record:

(1) Fouled towline on November 7, 1948.

Finding (R. p. 58): "Thereafter the SEA FOX succeeded in passing her spare steel hawser to the HERALD; this hawser fouled in the winch drum of the towing engine and had to be severed and *all but 600 feet of it was dropped overboard.*"

Opinion (R. p. 40): "On the following day the SEA FOX succeeded in passing its spare full length tow wire to the HERALD. This, however, fouled on the winch drum of the tug's towing engine and had to be cut off and dropped into the sea."

Record (Testimony of libelant Reichel, R. pp. 109-110):

A. * * * And we placed another hawser up at that time on the ship, and then we lost that hawser too, and so that left us with the hawser from the SEA PRINCE plus our short hawser.

Q. You didn't lose the second hawser? It just fouled on the drum?

A. But it wasn't of any use. We had to cut it, to get that off the drum completely.

Q. Then what did you do with that?

A. We dropped it overboard.

(2) High seas experience of Mr. Sommer.

Findings (R. p. 65): Captain Sommer had considerable experience as a master of tugs in ocean towing and during the year 1948 *prior to* the towage of the HERALD was the master of the SEA FOX while she was engaged in safely towing eight vessels on the Pacific Coast between San Francisco and the State of Washington and intermediate ports, three of which were precisely like the HERALD and of the same dimensions * * * Captains Sommer and Reichel were experienced tugboat men and each of them impressed the Court as able, competent, courageous and truthful mariners.

Opinion (R. p. 40): "All three (referring to Mr. Sommer, Mate Reichel and Mate Harris) were experienced and competent men."

Record (Testimony of Mr. Sommer, R. pp. 231, 232):

Q. How long have you been on the SEA FOX?
A. About six years.
Q. And where? Did you have any regular run?
A. No, just towing around the Bay.

Record (Testimony of Mr. Sommer, R. pp. 245-246):

Q. You have a master's license?
A. Limited.
Q. Limited?
A. Limited.
Q. Limited to what area?
A. San Francisco Bay and tributaries.
Q. You do not——
A. Lakes and sounds.
Q. You do not have a master's license permitting you to——
A. No.
Q. ——be captain of ocean-going vessels?
A. No.

Record (R. p. 246):

Q. Was this, the occasion of this incident, the first time you served as master of an ocean-going tug?
A. No, no.
Q. How many voyages?
A. I had about 16 trips up the coast, 16 or 17.
The Court. 16 trips up the coast.
Q. (By Mr. Morse). Prior to the HERALD OF THE MORNING trip?
A. I towed four ships up the coast before that.

Q. Did you take two other similar vessels to the HERALD OF THE MORNING up in 1948?

A. Yes, sir.

(3) Causation under the Pennsylvania rule.

Finding (R. pp. 65-66): "That nothing that Captain Sommer did or failed to do contributed in any way to the situation which gave rise to the necessity for the rendition of salvage services to the HERALD; that the lack of an unlimited master's license on the part of Captain Sommer did not and could not have contributed to the plight of the HERALD; the HERALD went adrift and into a position of grave danger solely by reason of the violence of the storm; that the parting of the hawser of the SEA FOX in the full gale on November 16, 1948 was an event over which neither Captain Sommer nor any other human had or could have any control; that the HERALD went adrift in said gale without fault or negligence upon the part of anyone."

Opinion (R. p. 51): "Assuming, however, that in this case the rule is applicable, the burden of proof has been carried because the evidence clearly shows that the HERALD was set adrift and carried into a position of danger solely by the violence of the storm."

Record: All evidence in the record is in direct conflict with both the finding and the opinion on this point, except in so far as the opinion is an erroneous conclusion of law. This is discussed further hereinafter.

(4) Tug's obligation under her towage contract.

Finding (R. p. 66): "That the SEA FOX thereafter incurred the aforementioned risks and performed the aforesaid duties and services which were not within the scope of her original towage contract."

Opinion (R. pp. 47-48): "Respondent argues that strong winds and heavy seas are apt to be encountered along the North Pacific coast in the month of November and that, therefore, they must have been in the contemplation of the parties to the towage contract. If this argument were sustained it would mean that a tug would be held strictly to its contract no matter how extraordinary and hazardous its efforts to save its tow imperiled by the violence of wind or waves. The Court does not believe that such a holding would be consonant with maritime policy or with the legal principles set forth above."

Record: Here, again, we find that while the trial Court honestly stated its decision on this phase of the case as a matter of "policy" and as a conclusion of law in its opinion, the appellee, as a matter of "appeal-proofing" restated the decision on the same important phase of the case as a "finding of fact". The record itself serves only to support the fact that the weather which was encountered was well within the contemplation of the parties at the time of entering into the contract.

(5) Total value of all salvage services.

Finding: No mention.

Opinion (R. p. 46): In view of all the evidence, therefore, the Court estimates that the total salvage should be considered at the sum of $60,000.00, provided all the salvors who rendered service claimed and were entitled to claim pay for their services.

Record: We believe the record, in view of the discretion afforded the trial Court in such matters, supports the holding indicated in the opinion, although we consider the amount to be liberal. The failure to include an equivalent "finding" despite appellant's urging (cf. R. p. 469) constitutes further "appeal-proofing" tending to make it impossible for appellant to urge on appeal that the award given the SEA FOX vis-à-vis the Government vessels was excessive.

E. In view of the trial Court's express ruling that the tug's statutory fault did not cast on it the burden of proving lack of possible causation petitioner was entitled to a review of this holding by the Court of Appeals and to a review de novo of the "factual" holding by the trial court on its "but if" dictum since all evidence on this issue was uncontested testimony of tug's own witnesses.

Traditionally admiralty trials were largely by deposition, and traditionally on appeal the review was in the nature of a trial *de novo.* In recent years the trial Court in admiralty cases more frequently hears live witnesses and the Appellate Courts have become loath to substitute their judgment for the trial Court's on questions requiring the resolution of con-

flicts in testimony. The development is a proper and healthy one, but the development should not exceed the reason for it.

In the present case the trial Court in its opinion held that the burden of proof imposed by the *Pennsylvania* case on a vessel guilty of statutory fault did not apply to this case (R. p. 50 and p. 471). Having reached this conclusion and satisfied itself that the *Pennsylvania* rule does not apply to a tug and tow situation, the trial Court was in no position or climate of view to then give proper consideration to the *facts* on its gratuitous "but if" dictum premise that the *Pennsylvania* rule was imposed on the tug by reason of its statutory fault.

It is perfectly clear from the opinion (R. p. 50) and from the trial Court's statement to counsel (R. p. 471) that if the case had been tried to a jury the trial Court would have refused petitioner's instruction "The salvage claimant tug Sea Fox interests are guilty of statutory fault in that the master was not licensed and must prove that this fault not only did not but could not have contributed to the danger of the tow, resulting salvage services and expense."

In other words, if the case had been tried to a jury it is apparent that petitioner would have received from the Court of Appeals a review of the legal rule on which the case was decided. It was error on the part of the Court of Appeals, calling for exercise of the supervisory powers of this Court, to permit petitioner to be deprived of review of the rule of law

on which the case was decided merely because trial Court permitted prevailing counsel to prepare obfuscatory and misleading "findings."

We respectfully suggest that the reason for the rule that an appeal in admiralty constitutes a trial *de novo* is to prevent undue weight from being given to "findings" which actually are based on and are expressions of the application of erroneous rules of law. The present case is perhaps an extreme and flagrant example but the very nature of the subject matter of most admiralty litigation gives in a majority of cases an unusual importance to the question of burden of proof, a question of law, and we suggest that in only unusual instances can an Appellate Court tell from the opinion, findings and conclusions, without reviewing the record, upon what rule of burden of proof the trial Court has decided the case.

In the present case, after satisfying itself that the *Pennsylvania* rule does not apply to statutory fault of a tug in a tug and tow situation the trial Court by way of a "but if" dictum in its opinion stated that if the rule applied the tug had carried its burden of proving that the lack of a licensed master could not have contributed to the danger of the tow (R. p. 51). We have heretofore shown that this conclusion was a conclusion of law and as such entitled to review by the Court of Appeals. In any event the conclusion concerned only matters as to which there was no conflict in testimony, all of the evidence on which petitioner relied necessarily being the evidence

produced by the tug's own witnesses, and as such petitioner in this admiralty case was entitled to a review *de novo.*

With respect to its contention that the lack of a licensed master not only could have but probably did contribute to the tow's danger petitioner relied on the following uncontested evidence and testimony:

> The Sea Fox left Drake's Bay, a place of safety, without repairing its fairlead traveller, the device which enables its towing engine to heave in on the towing cable (Sea Fox Log, Exhibit A, not printed, R. p. 372).
>
> The Sea Fox on the morning of November 13, 1948, received radio warning of approaching storm (testimony of libelant Reichel, R. p. 194) but did nothing to all intents and purposes until 4:20 p.m. November 14th when it radioed the Coast Guard for assistance (testimony of libelant Reichel, R. p. 171).
>
> On November 7 in relatively moderate weather the towing hawser had broken. The Sea Fox then put into Drake's Bay, a place of safety, in the meantime having fouled and destroyed her spare towing cable or "insurance wire" and on November 9 the Sea Fox left Drake's Bay with the tow but without any spare towing cable of usable length (testimony of libelant Reichel, R. pp. 109-110).

It was and is petitioner's contention that no licensed and qualified master would have permitted the tug and tow under his command to do any of the foregoing. The listing is not exhaustive, and cannot be

since what happened on the tug is peculiarly within the tug's knowledge, but the items we have specified are based on unconflicting testimony and evidence and the Court of Appeals is as capable of considering such with respect to petitioner's contention that the lack of a licensed master could have (and probably did) contribute to the danger of the tow as was the trial Court. Such being the case the Court of Appeals was bound to review the uncontested facts in light of the contention, and it was gross error for the Court of Appeals to rely without inquiry, as it did, on the "findings" of the trial Court (R. p. 436).

SECOND AND THIRD SPECIFICATIONS OF ERROR.

THE COURT OF APPEALS IN HOLDING THAT A TUG EMPLOYING AN UNQUALIFIED MASTER IN VIOLATION OF STATUTE MAY COLLECT SALVAGE FROM HER TOW, AND THAT THE TOW MAY NOT COLLECT DAMAGES FROM THE TUG, WHERE ON THE ADMITTED FACTS THE LACK OF A QUALIFIED TUG MASTER COULD HAVE CONTRIBUTED TO AND CAUSED THE TOW'S PERIL, HAS PROMULGATED A VICIOUS RULE OF GREAT IMPORTANCE.

(a) The Pennsylvania rule; the novel and vicious precedent of this case; the conflict between Circuits.

The Court of Appeals considered the case "essentially one of fact" (R. p. 435) and apparently did not consider that its *per curiam* opinion would be of major significance in stating (or revising) the law. The major issue presented here, and also the major issue presented to the Court of Appeals, by a ratio of two to one in pages of briefing, concerns the extent of

the burden of proof to be carried by a tug attempting to claim salvage from her tow when a fundamental statutory fault has been proved against the tug. The great importance of the decision on this point is indicated by the numerous inquiries we have received from attorneys in all maritime cities, including the Great Lakes, concerning this case with respect to litigation in which they are presently involved. We assume prevailing counsel have received at least an equal number of inquiries.

It is fundamental that a tug may not claim salvage from her tow unless the tug proves (1) that her services and the hazard were not within the contemplation of the contract and (2) that no fault or deficiency of the tug could have contributed to the danger of the tow requiring the "salvage" services.

The first of the mentioned rules is aptly restated in the International Salvage Convention text at 37 U.S. Stat. at L., page 1670, effective in the United States March 1, 1913 as follows:

> "Article IV *Tugs.*
>
> "A tug has no right to remuneration for assistance to or salvage of the vessel she is towing or of the vessel's cargo except where she has rendered exceptional services which cannot be considered as rendered in fulfillment of the contract of towage."

The second rule that a tug may not recover salvage from her tow if it appears that the fault of the tug may have contributed to the danger giving rise to the

"salvage" services is fundamental and is supported by all authorities which have considered the question.

The Krona (1886), 28 Fed. 318;

The Minnehaha, Lush., 335, 15 Eng. Reports, Full Reprint, p. 444;

The Clarita and The Clara, 1874, 90 U.S. 1, 23 L.Ed. 146.

The decision of the Court of Appeals in the present case effectively repudiates both of these fundamental rules. In addition, the Court of Appeals has effectively held that in a tug and tow situation so material a statutory fault as failing to provide a master possessing the license and qualifications required by statute does not cast upon the tug the burden of proof required by *The Pennsylvania* (1874), 86 U.S. 125, and uniformly applied by the Supreme Court and other circuits in similar factual situations. The Court of Appeals was not justified in repudiating these fundamental principles by any consideration of public policy and, indeed, made no attempt to justify its action on such grounds. The decision of the Court of Appeals is in open conflict with all considerations of sound public policy pertaining to relations between tug and tow. It constitutes a radical change in the basic law, as previously understood, governing the relations between tug and tow and for this reason has excited such extensive interest in the admiralty bar throughout the country.

In the *Pennsylvania* (1874), 86 U.S. 125, the Supreme Court of the United States held in a collision case that where there was statutory fault on the

part of one of the vessels, that vessel must prove not only that the statutory fault did not contribute to the accident but that it could not have contributed to the accident.

In the *Pennsylvania* (1874), 86 U.S. 125, the Supreme Court stated the extent of the application of the *Pennsylvania* rule as follows (emphasis supplied):

> "There can be no doubt that the WILLEY was guilty of a statutory fault in the failure to provide herself with the fog horn prescribed by the international regulations, and the presumption is that this fault contributed to the collision. *This is a presumption which attends every fault connected with the management of the vessel, and every omission to comply with a statutory requirement, or with any regulation deemed essential to good seamanship.*"

No statute is more profoundly directed to the preservation of lives and property at sea than those statutes which require the licensing of masters. The qualifications and experience of the master of the vessel, or the lack thereof, are without question the single element which most profoundly tends to render the vessel seaworthy or unseaworthy. Virtually all cases decided since the *Pennsylvania* case have placed upon the vessel whose master or officers were not licensed as required by statute, the burden required by the *Pennsylvania* rule. We cite a few of such cases:

In *Carr v. Hermosa Amusement Corp.* (C.A. 9, 1943), 137 Fed. (2d) 983, cert. den. 321 U.S. 764, an

anchored fishing barge was held at fault with respect to loss of life of passengers aboard the barge who were thrown overboard as a result of collision, because of the barge's statutory fault in failing to have aboard a licensed master. It was held that the barge was unable to carry its burden of proving that a licensed master would not have been equal to the emergency of rescuing the passengers following the collision.

In his dissenting opinion in the instant case, Judge Pope, as do we, considers the opinion of the Court of Appeals in the present case to be a repudiation of the decision in *Carr v. Hermosa Amusement Corp.*

In the *Henry O. Barrett* (C.C.A. 3, 1908), 161 Fed. 481, cer. den. 212 U.S. 573, reversing the lower Court, the towing tug was held solely at fault for a collision between the towed Henry O. Barrett and the anchored dredge, Columbia, for statutory fault under the *Pennsylvania* rule in that the person in charge of the tug's deck watch was unlicensed in violation of statute.

In the *City of Baltimore* (C.C.A. 4, 1922), 282 Fed. 490, a tug was held at fault in a collision case under the *Pennsylvania* rule because she was in command of an unlicensed master, the Court saying:

> "She was being navigated by a person without a master's license, in a busy harbor, in open violation of the law applicable to her (Comp. St. Secs. 8190, 8200; Inspectors' Rules (1916) V, Sec. 19) and, in such circumstances, it is incumbent upon her to show, not only that the absence of a licensed master did not enter into the occurrence, but that it could not have done so * * *".

The strong presumption of fault attending the employment of a master, mate or pilot not licensed as required by statute was relied upon as a ground of decision in the following cases: The *John F. Tolle,* (Cir. Ct. E.D. La. 1881), 12 Fed. 444, in which case the acting pilot's license had expired eight months previously; The *J. C. Hartt,* (Dist. Ct. S.D. N.Y., 1924), 39 Fed. (2d) 923; The *Walter D. Noyes* (Dist. Ct. E.D. Va., 1921), 275 Fed. 690, in which case it appears that the person acting as master possessed the necessary qualifications, but his failure to secure a license as required by statute was regarded as inexcusable carelessness; and *The B. S. Ford—District of Columbia,* (D.C.E.D. Va.), 1937 A.M.C. 603, in which case it appears that the master held a master's license but not for the waters in question.

There is no conceivable basis in principle or in policy for exempting the factual situation in the present case from the operation of the *Pennsylvania* rule. In the present case the Court of Appeals has declined to consider that a tug guilty of statutory fault in having an unlicensed man serving as master must carry the burden imposed by the *Pennsylvania* case in defending the tow's claim for damages suffered by the tow and even further has effectively held *that a tug with an unlicensed person serving as master and guilty of statutory fault may recover salvage for services rendered to her tow without proving that the tug's statutory fault could not have contributed to the tow's danger.* This holding not only shocks the senses but is in direct conflict with the holding of the Third Cir-

cuit in the *Henry O. Barrett,* 161 Fed. 481, in which a tug, guilty of statutory fault in having an unlicensed officer standing the deck watch, was held liable to pay its tow for the damages sustained by the tow in a collision, the tug being unable to prove that its statutory fault could not have contributed to the collision. In principle there can be no possible distinction made between the hull damage suffered by the tow in the *Henry O. Barrett* and the heavy obligation incurred by the owners of the HERALD in the present case to pay salvage to other interests after being placed in a situation of danger by the actions of its tug under the direction of an unlicensed man.

Every consideration of principle and argument of policy that makes the application of the *Pennsylvania* rule to collisions between stranger vessels both necessary and beneficial applies with redoubled cogency to a situation such as the present in which a tug is claiming a bonus award for services to her tow. Every man aboard the tug was not only an interested witness but was also an actual beneficial libelant in pursuing the claim against the tow for a salvage award. On the other hand the men aboard the tug are the only possible witnesses who know or could know the details of what took place aboard the tug. In such circumstances, statutory fault having been proved against the tug, it is appropriate that the burden of the *Pennsylvania* rule be placed upon the tug if it is ever to be placed upon any vessel in any factual situation.

The decision and opinion of the Court of Appeals in this case treats the obligation of a tug to its tow

as non-existent and by refusing to apply the *Pennsylvania* rule gives two of the libelants, Shipowners and Mr. Sommer, a reward of $20,000 for their violation of a criminal statute. If the writ of certiorari is denied, the decision of the Court of Appeals will stand as a repudiation of the maxim of jurisprudence, stated among other places in Section 3517 of the California Civil Code: "No one can take advantage of his own wrong."

(b) On the uncontested facts of record, no reasonable man can say that respondent carried its burden of proof under the Pennsylvania rule.

> "* * * It is simply impossible to conclude that the master's lack of qualifications 'could not have contributed' to the loss or the situation which gave rise to the necessity of salvage."
>
> Pope, Circuit Judge, (R. p. 481).

It is petitioner's view that on the basis of the uncontested testimony of the tug it established faults on the part of the tug which were not explained and which gave rise to an inference of ultimate fault, even in the absence of proved statutory fault, under the principles discussed in *Sternberg Dredging Co. v. Moran Towing and Transportation Co.* (C.A. 2 1952) 196 Fed. (2d) 1002, 200 Fed. (2d) 603. It is not necessary for petitioner, however, to argue the rather difficult questions of "inference" and "burden of persuasion", since the statutory fault of the tug was clearly and conclusively proved, and on the uncontested facts of record it was impossible for the tug to carry its burden under the *Pennsylvania* rule of

proving that its statutory fault could not have contributed to the loss and the necessity for the salvage services.

The tug SEA FOX was a vessel of 282 gross registered tons (R. 56) and at all pertinent times was navigated on the "high seas". Mr. Sommer had no license to serve as master or navigating officer in charge of a watch except for San Francisco Bay and tributaries (R. 245). In Appendix "D" hereto, we set forth in full the provisions of the Officers' Competency Certificates Convention 1936 and in Appendix "E" hereto we set forth in full the administrative and penalty provisions 46 U.S.C.A. 224 A. It is perfectly clear that Mr. Sommer had no license or certificate as required by the convention and the penalty statute and that his serving as master of the SEA FOX, and also as navigating officer in charge of a watch, was in violation of both the convention and the penalty statute. This has been admitted, although the trial Court declined to amend the findings and conclusions prepared by prevailing counsel to show one way or the other.

It is equally clear that Mr. Sommer did not have the experience or other qualifications necessary to secure a competency certificate to serve as master of the SEA FOX on a trip from San Francisco to Seattle. In Appendix "F" hereto we set forth for ready comparison the Coast Guard regulations governing the issuance of (1) the license for inland waters, which Mr. Sommer held, and (2) the high seas license which under the statute Mr. Sommer was re-

quired to have to serve as master or as officer in charge of a watch on the SEA FOX during the voyare in question. A brief review of Appendix "F" readily discloses the extensive and far-reaching nature of the qualifications which Mr. Sommer *should have had* over those which he did have.

Of particular interest is the fact that for a master's license under the convention, the regulations (46 C.F.R. 10.15-29, cf. App. "F") require four years service *at sea* of which one year must be as a licensed mate or equivalent.

With regard to his actual experience, Mr. Sommer testified in response to questions by the Court (R. 231-232):

"Q. What is your business or occupation?

A. Captain of a tug—the tug SEA FOX.

Q. How long have you been on the SEA FOX?

A. About six years.

Q. And where? Did you have any regular run?

A. No, just towing around the bay."

It is also important to note that in order to have secured a master's certificate under the convention, Mr. Sommer under the regulations (46 C.F.R. 10.15-31, cf. App. "F") would have had to demonstrate proficiency in:

Meteorology, use and reading of weather bulletins;

Keeping a ship's head to sea in heavy weather with engines broken down; * * *

Nowhere in the record does it appear that Mr. Sommer had even rudimentary knowledge or experience in interpreting and applying the information contained in the more or less technical weather bulletins used for high seas navigation. Nowhere in the record does it appear that Mr. Sommer understood the significance of the radio weather bulletins received by the SEA FOX on November 12 and 13 (set forth in full Appendix "C", being excerpts from Respondent's Exhibit J not printed) and from the actions of the tug after receiving such bulletins it would appear that they were not understood.

The lack of high seas experience on the part of Mr. Sommer acting as master of the tug was of extreme importance, and even if such lack of high seas experience were not related to statutory fault, as it is, it should cast upon the tug the burden of proving that the master's deficiencies could not have contributed to the tow's perils. There is no indication in or out of the record that Mr. Sommer had ever been off the North Pacific Coast in the stormy winter months or even that he had ever been outside of San Francisco Bay in any except the calmest seasons of the year, except for one trip from San Francisco, California to Eureka, California with an oil barge in the month of October. There is no indication that Mr. Sommer had any experience or personal knowledge of the type of conditions that were to be expected in a storm off the North Pacific in the month of November, and as a result there is no indication that he felt constrained to take the precautions which

a master having such experience would have found essential.

We quote here, as we did for the District Court and for the Court of Appeals, an excerpt from the United States Coast Pilot, Pacific Coast (6th Edition, 1943) a United States Government publication and the standard handbook for all mariners operating off the Pacific Coast, from its section on Pacific Coast weather by months, page 37:

> "October marks the beginning of stormy weather. Occasional disturbances with high southeasterly gales may be expected from the Strait of Juan de Fuca south of Point Reyes. Rainfall is heavier and fog is less frequent except south of Cape Mendocino.
>
> "November is a stormy month. Southeasterly gales are frequent, increasing in severity toward the close of the month. This month marks the beginning of the rainy season in California.
>
> "December is a stormy month. Southeasterly gales are frequent and winds from 40 to 60 miles an hour may occur with these storms. The rainfall is heavy along the entire coast. Low-lying fogs frequently occur in the morning along the coast, but are much less frequent than in summer."

The foregoing is pertinent, not only in showing that the conditions encountered by the tug and tow during the trip were not unforeseeable and were of a type that was within the contemplation of the parties that entered into the towage contract, but also for emphasizing the foolhardiness of Mr. Sommer in

setting out from Drake's Bay with a broken towing engine after he previously and in moderate weather had experienced difficulty in handling the tow and the tow in moderate weather had broken adrift.

The fairlead traveler, the device which makes it possible to heave in on the towing wire, was broken in the difficulties which the tug experienced in the moderate weather on November 7, was removed at Drake's Bay and was never repaired or replaced before or after the tug left Drake's Bay on November 9. This appears from the SEA FOX log (Resp. Exh. A, not printed, R. 372). This, however, was admitted to be the fact and was included in the findings (R. 58). In normal routine the tug in handling her tow would have alternately let out and heaved in on the towing cable in order to ease the strain on the towing winch (R. 167, 192). With the fairlead traveler broken, however, it was impossible for the tug to heave in on the towing cable, and therefore she was unable to slack off on the wire at moments of greatest strain because of fear that she would lose the towing cable completely, approximately 200 feet of towing cable being required on the towing drum to secure it (R. 153, 154). The usual length of towing wire was 1200 feet. As a practical matter, the "spare" towing wire of 600 feet, which was aboard the SEA FOX when she left Drake's Bay, was unusable (R. 155), because of the necessity of keeping 200 feet on the drum and increased probability of breaking the towing cable if a short length is used. It is true that a gale was blowing when the towing wire finally

parted, but it parted because of the breakdown of the towing engine and the inability to heave in or slack out the towing wire, which resulted in the wire's finally smashing itself through against a part of the towing engine (Testimony of libelant Reichel, R. 124)

> "parted right on the fairleads. The wire finally smashed itself right there until it parted."

There is no proof or indication whatsoever that the towing engine or mechanism was inspected, tested or renewed in any way at Drake's Bay following its earlier breakdown. There is no indication or proof of any nature that the inability to heave in the towing wire prior to November 16, and the resultant inability to pay wire out, did not so materially contribute to increased strain on the towing mechanism as to directly cause its final complete breakdown and the ultimate battering apart of the towing cable.

The fact that a gale was blowing when the cable finally broke is and can be no indication that the demonstrated and admitted faults did not or that the lack of a qualified master could not have contributed to the tow's danger.

> "The carrier answers that the hurricane was an act of God—to which we agree, but to which we answer that an act of God is no excuse if negligence be shown."
>
> *Blumenthal v. Atlantic Coast Line Railway Co.*, 2 C.A. 1943, 139 Fed. (2d) 288.

> "It is not inevitable accident, as was well remarked by the learned judge in the case of the

Juliet Erskine, 6 Notes of Cases, 634, where a master proceeds carelessly on his voyage, and afterwards circumstances arise when it is too late for him to do what is fit and proper to be done.

Union Steamship Co. v. N.Y. & Va. SS Co., 65 U.S. 701, 24 Howard 313, 16 L.ed. 699.

For the reasons stated a writ of certiorari should be issued to the Corut of Appeals for the Ninth Circuit as prayed.

Dated, San Francisco, California,
March 9, 1953.

Respectfully submitted,
CLARENCE G. MORSE,
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GRAHAM & MORSE,
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(Appendices Follow.)